Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petition for Declaratory Ruling that Inflexion Communications ExtendIP VoIP Service Is Exempt from Access Charges	WC Docket No. 04-52

COMMENTS OF THE VERIZON TELEPHONE COMPANIES

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I. Introduction and Summary

The Commission should let Voice over Internet Protocol ("VoIP") products and services develop in a competitive market where all providers are free from economic regulation. In furtherance of that goal, the Commission should declare that VoIP services are interstate services subject to the Commission's exclusive jurisdiction.

But whether providers of VoIP services, such as Inflexion Communications Inc. ("Inflexion"), should be subject to economic regulation is an entirely separate question from whether they should compensate local exchange carriers ("LECs") like Verizon for the use of the public switched telephone network ("PSTN"). Under the Commission's existing precedents, access charges clearly apply to VoIP traffic that uses the PSTN.[2] Because Inflexion fails to give any detail regarding its ExtendIP service, it is unclear whether or how it uses the PSTN.

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[1] The Verizon telephone companies ("Verizon") are the local exchange carriers affiliated with Verizon Communications Inc., listed in the Attachment to these Comments.

[2] *See, e.g.*, Comments of the Verizon Telephone Companies, Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b), WC Docket No. 03-266 (FCC filed March 1, 2004) ("Verizon Level 3 Comments").

However, to the extent that Inflexion uses the PSTN for its VoIP traffic, access charges apply to the service.[3]

Inflexion bases its *Petition* on the bare assertion that allowing it to evade lawful access charges is necessary to its plan to serve "low-income and underserved consumers" who are "presently unable to afford traditional telephone service."[4] Moreover, Inflexion suggests that requiring it to pay access charges will prevent it from reaching its goal of providing phone service to 99.9% of the American population.[5] These goals are laudable; indeed, the Commission's Lifeline and Link-Up programs are designed to increase access to basic telephone service for low-income consumers. Verizon has worked with the Commission and the states to provide low-income consumers with access to quality services at just, reasonable, and affordable rates.

Inflexion fails to explain why the Commission should disregard its current universal service programs, or why Inflexion's ExtendIP service is better suited than existing programs for increasing universal service. Inflexion fails to address why LECs should be required effectively to fund Inflexion's service by not collecting access charges when that service uses the PSTN. Inflexion's petition is deficient and should be denied.

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[3] *See* Petition for Declaratory Ruling that Inflexion Communications ExtendIP VoIP Service Is Exempt from Access Charges, WC Docket No. 04-52 (FCC filed Feb. 27, 2004) ("*Petition*").

[4] *Petition* at 3, 6.

[5] *Id.* at 10.

II. Inflexion's ExtendIP VoIP Traffic is Jurisdictionally Interstate

Although the *Petition* does not explain in any detail how ExtendIP VoIP service actually works,[6] it is clear at least that Inflexion's ExtendIP is an interstate service subject to this Commission's exclusive jurisdiction. Inflexion explains that its ExtendIP VoIP service can be provided without requiring a home address.[7] The party at the IP end of an ExtendIP call could thus be located anywhere there is a broadband connection. The Commission has held that such services are jurisdictionally interstate.[8]

Most recently, the Commission declared that pulver.com's service was interstate because the "global portability" of pulver.com's service allowed a user to "initiate and receive on-line communications from anywhere in the world where it can access the Internet via a broadband connection," thus making it "impossible or impractical to attempt to separate [pulver.com's service] into interstate and intrastate components."[9] To the extent that Inflexion's ExtendIP

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[6] Inflexion's Internet web site <www.ifxc.com> is of no help. It contains no information on ExtendIP. Indeed, with the exception of single press release, ExtendIP (or "XtendIP," according to the press release) is not even mentioned. *See* Inflexion January 30, 2004 Press Release ("The XtendIP offering will explore ways for municipal governments and development bureaus to extend existing phone services to redeveloping areas.").

[7] *See Petition* at 8.

[8] *See*, *e.g.*, Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, ¶ 59 (2002) (classifying cable modem service as interstate, recognizing that "an examination of the location of the points among which cable modem service communications travel" reveals that the points "are often in different states and countries"), *vacated in part on other grounds*, *Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003); Memorandum Opinion and Order, *GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, 13 FCC Rcd 22466, ¶ 1 (1998) (concluding that DSL service, "which permits Internet Service Providers (ISPs) to provide their end user customers with high-speed access to the Internet, is an interstate service and is properly tariffed at the federal level").

[9] *See* Memorandum Opinion and Order, *Petition for Declaratory Ruling that pulver.com's Free World Dial Up Is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, FCC 04-27, ¶ 22 (FCC rel. Feb. 19, 2004) ("*Pulver Order*").

service permits customers to make or receive calls over a broadband connection that is independent of any geographical location, the Commission's rationale from the *Pulver Order* would confirm that Inflexion's service is jurisdictionally interstate.

III. Under Existing Rules, Interstate Voice Calls Are Subject to Access Charges When They Use the PSTN

This Commission recently reiterated what has been clear since the access-charge regime was established over 20 years ago: "any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network."[10] As the Commission explained, the "cost of the PSTN should be borne equitably among those that use it in similar ways."[11] Inflexion is providing a service that allows its customers to engage in a real-time voice conversation during a phone-to-phone call with customers of other carriers located on the PSTN, and such a service is undeniably a service to which access charges and universal-service payments apply.

This is true even if the Commission were to conclude that Inflexion's service is appropriately classified as an "information service."[12] Providers of information services use exchange access services and are, therefore, obligated to pay access charges unless otherwise

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[10] *See* Notice of Proposed Rulemaking, *IP-Enabled Services*, WC Docket No. 04-36, FCC 04-28, ¶ 61 (FCC rel. Mar. 10, 2004) ("*VoIP NPRM*").

[11] *Id.*

[12] While access charges apply even if Inflexion's service is considered an "information service," the issues with respect to the Communications Assistance for Law Enforcement Act, 47 U.S.C. §§ 1001-1010 ("CALEA") are more complicated. If CALEA is to fulfill its function of ensuring that law enforcement officials have the technical means to intercept wire and electronic communications and to access call-identifying information, then it must apply to *all* providers of such services, including cable companies and others – such as Inflexion – that offer broadband transmissions of voice communications. Otherwise, criminals will be able to avoid surveillance by simply using voice over Internet protocol to communicate rather than the traditional telephone network.

exempt.[13] Over 20 years ago, the Commission recognized that ISPs were "[a]mong the variety of users of access service[s]," a group that included "facilities-based carriers, resellers (who use facilities provided by others), sharers, privately owned systems, enhanced service providers, and other private line and WATS customers, large and small."[14] When it created the access-charge regime, the Commission's "intent was to apply these carrier's carrier charges to interexchange carriers, and to all resellers *and enhanced service providers* . . . ."[15]

Having made access charges applicable to ISPs, however, the Commission then adopted a narrow exemption. The Commission concluded that where "ISPs use incumbent LEC networks to receive calls from their customers,"[16] they should not be required to pay access charges. In these circumstances, the ISP has purchased business lines in order to communicate with its customers. "[T]he ISP's use of the LEC facilities is analogous to the way another business subscriber uses a similarly-priced local business line to receive calls from customers who want to buy that subscriber's wares that are stored in another state and require shipment back to the customer's location."[17]

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[14] *Id.*

[15] *Id.* ¶ 76 (emphasis added).

[16] First Report and Order, *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges*, 12 FCC Rcd 15982, ¶ 343 (1997) ("A*ccess Charge Reform Order*"), petitions for review denied, *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998) (emphasis added).

[17] Brief for the FCC at 75-76, *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1997) (No. 97-2618) ("FCC Br.") (emphasis added). In upholding the ISP exemption from

But that is different from the way VoIP providers use the network. VoIP providers use the network to provide a conduit between two end users who wish to speak to one another. The end users are not communicating with the VoIP provider and may not even be customers of the VoIP provider; indeed the VoIP provider is transparent to the end users who are engaged in real-time voice communication. In these circumstances, the VoIP provider "use[s] the public switched network in a manner analogous to IXCs."[18] As a result, the central justification for the ISP exemption, and for the Commission's decision to treat ISPs differently from IXCs, is not applicable. Under such circumstances, the ISP exemption does not apply, and VoIP providers are subject to the same access charges applicable to any carrier that uses the PSTN in similar ways.

In sum, even if the Commission were to conclude that Inflexion's services are information services, they are nonetheless subject to the same access charges applicable to any carrier that uses the PSTN in similar ways.

IV. Inflexion's Policy Reasons for Granting the *Petition* are Unpersuasive

Lacking any legal basis to support its request to exempt its ExtendIP from access charges, Inflexion instead bases its *Petition* on its claim that allowing it to escape access charges will

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paying access charges, the Eighth Circuit agreed with the Commission, concluding that ISPs "do not utilize LEC services and facilities in the same way or for the same purposes as other customers who are assessed per-minute interstate access charges. . . . [E]ven where two different sets of carriers seek to use LEC network services and facilities that might be 'technologically identical,' the services and facilities provided by the LEC are 'distinct' *if the carriers are making different uses of them*." *Southwestern Bell*, 153 F.3d at 542 (emphasis added).

[18] First Report and Order, *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End User Common Line Charges*, 12 FCC Rcd 15982, ¶ 345 (1997) ("*Access Charge Reform Order*"), *petitions for review denied, Southwestern Bell Tel. Co. v. FCC,* 153 F.3d 523 (8th Cir. 1998) (emphasis added).

facilitate its plan to serve "low-income and underserved consumers" who are "presently unable to afford traditional telephone service"[19] and to achieve the goal of universal service throughout the United States.[20] Inflexion provides no evidence that access charges are currently harming low-income consumers or that current universal service programs are inadequate. For these reasons alone, the Commission should deny the *Petition*.

A. Access Charge Rates Are Just and Reasonable

Inflexion spends most of its *Petition* arguing that access charges are too high and that access fee revenues are not an effective means for supporting underserved markets.[21] But this Commission has found interstate access rates to be just and reasonable, and their purpose is not to provide implicit subsidies for universal service but to compensate LECs for the use of their networks.

In adopting the CALLS proposal for setting access rates, the Commission followed its "long-standing policy to require, to the extent possible, rate structures to reflect the manner in which carriers *incur costs*."[22] The Commission found that the current access-charge regime "reduces, and in most instances eliminates, implicit subsidies among end-user classes; makes implicit universal service funding in access charges explicit and portable; [and] provides

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[19] *Petition* at 3, 6.

[20] *Id.* at 10.

[21] *See Petition* at 7 ("The ILEC's are not held accountable to show access fees benefit underserved markets."); *id.* at 9 ("The policy of allowing ILECs to impose access fees arose at the time of the breakup of AT&T in 1984 in order to have heavy users of interexchange calling subsidize local rates."); *id.* at 11-12.

[22] Sixth Report and Order, *Access Charge Reform*, 15 FCC Rcd 12962, ¶ 129 (2000) ("*CALLS Order*") .

significant benefits to consumers who make few or no long distance calls."[23] As a result, the Commission identified and removed $650 million of implicit universal service support in interstate access charges and created an explicit universal service support mechanism in this amount to replace the implicit support.[24] The Commission concluded that the access charges established in the CALLS proceeding were "just and reasonable."[25] Inflexion's unsupported allegation that access fees somehow represent an obstacle to universal service cannot justify the relief that Inflexion is seeking.[26]

B. Inflexion Fails to Explain Why the Commission's Existing Universal Service Programs Are Inadequate

Inflexion's *Petition* essentially requests that the Commission disregard its current universal service programs designed to assist low-income customers,[27] and instead create an entirely separate universal program – funded entirely by LECs – that would be administered solely at Inflexion's discretion and apply only to Inflexion's VoIP customers. That request should be summarily denied.

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[23] *Id.* ¶ 29; *see also id.* ¶ 36 ("The CALLS Proposal is a reasonable approach for moving toward the Commission's goals of using competition to bring about cost-based rates, and removing implicit subsidies without jeopardizing universal service.").

[24] *See id.* ¶ 32; *see also* 47 U.S.C. § 254(e) (requiring that universal service subsidies be "explicit").

[25] *See CALLS Order* ¶ 41 (emphasis added).

[26] For the same reasons, the Commission should reject Inflexion's unsupported statement that access charges "violate antitrust principles." *Petition* at 12.

[27] *See* Report and Order, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 12 FCC Rcd 8776 (1997), as corrected by Errata, CC Docket No. 96-45 (rel. June 4, 1997) ("*Universal Service Order*"). As Verizon has previously made clear, VoIP providers should have the same universal service obligations as other carriers. *See* Verizon Level 3 Comments at 3. Inflexion states that it is not addressing the issue of universal service support, yet it notes that requiring universal service contributions raises the cost of service just as requiring payment of access fees does. *See* Petition at 6.

First, if Inflexion disagrees with the Commission's approach to universal service and believes that its ExtendIP program would be a better approach, Inflexion should raise those issues in the universal service docket.[28] Inflexion's *Petition*, however, fails to provide any details underlying its ExtendIP program, other than that it is intended to provide service in "underserved markets."[29] Indeed, because Inflexion fails to define what an "underserved market" is, it is not even apparent whether low-income consumers would be benefited at all.[30]

Second, the *Petition* nowhere explains why an exemption from access fees would materially increase subscribership to basic phone service. Inflexion's argument assumes that cost is the only reason why certain consumers do not subscribe to local telephone service.[31] But, as the Commission has found, "subscribership levels are not dispositive of the issue of whether rates are affordable."[32] That is because consumers who can otherwise afford to subscribe to local phone service often do not do so for reasons not relating to cost.[33] Inflexion's assumption that

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[28] The Commission is currently in the process of considering whether to revise and expand the Lifeline universal service program. *See* Recommended Decision, *Federal-State Joint Board on Universal Service*, 18 FCC Rcd 6589 (2003).

[29] *See, e.g., Petition* at 3.

[30] Recent statements by Inflexion's chief technology officer make clear that the ExtendIP program is also targeted at entities that can afford phone service. *See* Telephony Online, Inflexion seeks access-charge exemptions from FCC, at 1 (Mar. 3, 2004), *available at* http://telephonyonline.com/ar/telecom_inflexion_seeks_accesscharge/, ("In terms of the entities serving the underserved population, that could include enterprises as large as the city of Detroit, which '*has enough money to pay its bills* but . . . could use more affordable phone service.'") (quoting Daniel Berninger, Inflexion CTO) (emphasis added and ellipsis in original).

[31] *See Petition* at 6.

[32] *Universal Service Order* ¶ 113.

[33] For example, some consumers have chosen to drop their wireline service altogether, and instead, to rely on their wireless service as their primary line. *See* Eighth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 18 FCC Rcd 14783 (2003) ("Eighth Annual Report") ("There is much evidence . . . that consumers are substituting wireless service for traditional wireline communications.").

lowering rates would materially increase subscribership (let alone to the level of 99.9%) is unsupported.[34] And, depriving LECs, especially rural LECs, of access charges revenues would more likely harm universal service by denying LECs the ability to recover the full costs of their networks.

Third, the *Petition* nowhere explains why LECs – and their customers – should be forced fully to fund Inflexion's program. As an initial matter, any carrier – whether VoIP or circuit-switched – could make the argument that allowing it to avoid paying charges for its use of the PSTN would permit it to lower rates and thereby promote universal service. Under Inflexion's rationale, all carriers would be exempt from paying access charges.

Moreover, requiring LECs to fund Inflexion's VoIP offering would violate the nondiscriminatory principles underlying the 1996 Act.[35] As the Commission has recognized, under section 254, "[u]niversal service support mechanisms and rules should be competitively neutral," meaning that "that universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another."[36] But a special exemption for Inflexion's VoIP service would not

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[34] Inflexion also asserts that its ExtendIP service would "address periphery markets not served by the Universal Service Program." *Petition* at 7. But Inflexion fails to explain what these "periphery markets" are or why consumers in those markets would not qualify for assistance under the Commission's universal service programs.

[35] Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151, ¶ 36 n.63 (2001), *remanded, WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1927 (2003) ("[O]ne of the Commission's primary goals when designing an access charge regime was to ensure that access users were treated in a nondiscriminatory manner when interconnecting with LEC networks in order to transport interstate communications.") (citing *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1101-1108, 1130-34 (D.C. Cir. 1984)).

[36] *Universal Service Order* ¶ 47.

only unfairly benefit a single VoIP provider over other providers, but it would also unfairly favor one kind of technology over another.[37]

Finally, Inflexion argues that its VoIP services will promote universal service because they cost less and offer consumers more flexible payment and pricing options.[38] Inflexion complains that "ILEC practices concerning deposits, credit terms, and collections raise additional barriers for people in underserved markets to obtain and keep telephone service."[39] Inflexion, of course, is free to pass along to its VoIP customers the cost savings from lower operating costs and to offer those customers different credit terms.[40] But this has nothing to do with whether Inflexion should be required to pay lawful access charges when its services use the PSTN.

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[37] Granting the *Petition* would also violate the prohibition in section 202 against unreasonable discrimination. And, to the extent that LECs would be forced to raise rates for other carriers in order to make up for the lost access revenues, those other carriers would effectively be implicitly subsidizing Inflexion's service in violation of section 254(e),

[38] *See Petition* at 7-8, 10-11.

[39] *Id.* at 7; *see also id.* at 10. Inflexion also argues that its VoIP service offers low-income consumers other advantages, such as pre-paid calling cards, disposable customer premises equipment, and alternative billing arrangements. These are all advantages that Inflexion is free to provide to consumers whether or not its *Petition* is granted.

[40] Inflexion argues that access charges prevent it from offering an unlimited service offering. *See Petition* at 10 ("The per minute nature of access fees makes it risky to offer flat unlimited usage service, so it limits the types of viable business models."). That argument is flawed, however, because Inflexion nowhere explains why universal service should be concerned with ensuring that low-income subscribers should have access to *unlimited* usage plans. In any event, that argument ignores that VoIP-providers offer such unlimited calling plans today. *See, e.g.*, Time Warner Digital Phone (offering unlimited local and long-distance calling at a flat monthly rate), *available at* http://www.twcnc.com/digital_phone/index.cfm (last visited Apr. 6, 2004).

V. Conclusion

For the foregoing reasons, the Commission should deny Inflexion's *Petition*.

Respectfully submitted,

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ATTACHMENT

THE VERIZON TELEPHONE COMPANIES

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc. These are:

Contel of the South, Inc. d/b/a Verizon Mid-States
GTE Midwest Incorporated d/b/a Verizon Midwest
GTE Southwest Incorporated d/b/a Verizon Southwest
The Micronesian Telecommunications Corporation
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Hawaii Inc.
Verizon Maryland Inc.
Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.